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Case No. _____

SUPREME COURT OF THE UNITED STATES
October Term 1992

HARRY K. SINGLETARY,

Petitioner,

v.

FRANK ELIJAH SMITH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978), AND HITCHCOCK v. DUGGER, 481 U.S. 393 (1987), AN ISSUE WHICH THE CIRCUIT COURT BELOW DECLINED TO ADDRESS BASED UPON THE FACT THAT THE MATTER WAS LEFT UNRESOLVED IN THE ORIGINAL OPINION AND CURRENTLY IS THE SOURCE OF IRRECONCILABLE CONFLICT BETWEEN THE STATE AND FEDERAL COURT BELOW

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 970 F.2d 766 (11th Cir. 1992), and is reproduced in the appendix to this pleading.[1] [A1-A3].

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[1] [A-] represents a citation to the materials contained in the appendix to this pleading.

The decision of the United States District Court for the Northern District of Florida is reported at 758 F.Supp. 688 (N.D. Fla. 1990), and is likewise reproduced in the appendix to this pleading. [A4-A47].

The decision of the Florida Supreme Court, which denied relief as to the claim now at issue, is reported at 556 So.2d 1096 (Fla. 1990), and is also set forth in the appendix to this pleading. [A48-A54].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered on August 18, 1992. No petition for rehearing and suggestion for rehearing in banc was filed due to the summary nature of the order entered by a panel of the Eleventh Circuit. This Court's

jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States are involved:

Amendment XIV, which provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdicition thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States: nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdicition the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment X, which provides that:

> Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

On the evening of December 12, 1978, Frank Smith and two codefendants robbed, kidnapped, raped and murdered Sheila Porter. The details of the crime are adequately detailed in Smith v. State, 424 So.2d 726 (Fla.), cert. denied, 462 U.S. 1145 (1983), and Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988).

Smith was tried and convicted on all four counts in August 1979. He was subsequently sentenced to death in keeping with the recommendation of the advisory jury. The sentencing judge found and weighed the following six aggravating factors: (1) that the defendant had prior convictions for violent felonies, robberies; (2) that this murder was committed in the course of an enumerated felony, kidnapping; (3) that this murder was committed to avoid arrest; (4) that this murder was committed for pecuniary gain; (5) that this murder was heinous, atrocious and cruel; (6) that this murder was cold, calculated and premeditated. The court found one statutory mitigating factor, Smith's age of nineteen at the time the crime was committed.

Smith appealed his conviction and sentence of death to the Florida Supreme Court, raising eight issues. (None of which raised a Lockett v. Ohio, 438 U.S. 586 (1978) issue). Finding no reversible error, the Florida Supreme Court affirmed Smith's conviction and sentence of death and certiorari review was subsequently denied. Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983).

As a result of a death warrant signed by the Governor of Florida in 1984, Smith filed his first petition for collateral relief, pursuant to Rule 3.850, Fla.R.Crim.P. In his state collateral litigation, Smith raised ten issues, one of which specifically asserted that "the instructions as to mitigation were restricted (Eddings v. Oklahoma; Lockett v. Ohio)." Relief was

denied after an evidentiary hearing (on the effectiveness of counsel issue), and Smith appealed. The Florida Supreme Court found most of the issues, including the Lockett v. Ohio issue, procedurally barred, and rejected on the merits any assertion that trial counsel rendered ineffective assistance of counsel. Smith v. State, 457 So.2d 1380 (Fla. 1984).

Smith then went to federal court, seeking relief pursuant to 28 U.S.C. §2254. Therein, he raised eighteen claims, one in particular asserting that both Lockett error and Hitchcock error occurred in his case. The federal district court, the same judge that heard the second successive claims, denied all relief without further evidentiary proceeding. Smith appealed to the Eleventh Circuit, raising only

six issues. One of those six issues asserted the unreliable nature of the sentencing proceeding. All relief was denied, Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988). Smith filed a petition for rehearing in which he raised, inter alia, a claim under Hitchcock v. Dugger, 481 U.S. 393 (1987). Although a Hitchcock-type claim was asserted prior to this point, the Hitchcock decision was decided by the United States Supreme Court after the federal district court rendered its decision and while Smith's case was pending on appeal in the Eleventh Circuit. Rehearing was subsequently denied but without prejudice to Smith's presenting his unexhausted Hitchcock claim to the Florida state courts. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989). Smith filed a timely petition

for writ of certiorari which was denied March 19, 1990 (he did not include therein either a Lockett or a Hitchcock claim).

Smith subsequently filed a second motion for post-conviction relief in the state trial court pursuant to Rule 3.850, Fla.R.Crim.P. He raised twelve issues, one of which was a Hitchcock error. The trial court, on January 26, 1990, denied Smith's successive motion for post-conviction relief. The court found that all claims except the Hitchcock claim were procedurally barred and as to the Hitchcock claim, the trial court found the error to be harmless error beyond a reasonable doubt. On appeal the Florida Supreme Court denied all relief, Smith v. State, 556 So.2d 1096 (Fla. 1990), finding that all but the Hitchcock error was procedurally

barred and as to Hitchcock, said error was harmless beyond a reasonable doubt.

Smith then filed a successive federal habeas corpus petition in the Northern District of Florida. On June 8, 1990, the court, in Smith v. Dugger, granted relief as to the Hitchcock error, finding:

> Having determined that (a) substantial nonstatutory mitigating evidence exists in this case, (b) the State has failed to prove the harmlessness of the erroneous instruction which prevented the introduction and/or consideration of such evidence by the state court jury, and (c) this Court should not substitute its judgment for the considered judgment of a Florida jury properly instructed on sentencing under existing constitutional law, this Court must GRANT conditional relief on the Hitchcock claim of petitioner Frank Smith.

[A-42]. The court further observed:

> The state trial court did not hold an evidentiary hearing to determine the harmlessness of

> Hitchcock error in Smith's case. Had the State, in any manner, contested the veracity of the proffered nonstatutory mitigating evidence, or had the record been less clear about the constraining effect of the erroneous instruction on the tactics of defense counsel, this Court might be obligated to hold such a hearing. As the record stands, however, the Hitchcock issue is clearly focused for this Court and can be resolved without an evidentiary hearing here. Accordingly, petitioner's request for an evidentiary hearing before this Court is DENIED.

[A42-A43].

Respondent timely filed a motion to alter or amend judgment. On August 15, 1990, the district court denied Respondent's motion.

The Eleventh Circuit Court of Appeals, on August 18, 1992, affirmed the granting of habeas corpus relief in a summary-style opinion, concluding:

> Our review indicates that the record well supports the district court's findings of

> fact, and the district court faithfully applied the Supreme Court's and this Circuit's precedents to the facts. This Court is unable to say that the Hitchcock error is not harmful beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[A2] (emphasis added).

The Petitioner declined to file a petition for rehearing in the Court of Appeals since it was clear that the court was unwilling to entertain Petitioner's assertion raised in its briefs that neither the district court nor for that matter the Court of Appeals had utilized the appropriate standards in assessing whether relief should be provided to Smith.

The record reflects that an erroneous jury instruction pursuant to Hitchcock, supra, was read.

In Smith's successive collateral attack asserting his Hitchcock claim,

Smith argued that the trial judge and the capital sentencing jury were led to believe they could not consider nonstatutory mitigating circumstances in reaching their respective judgments, as the appropriate sentence to be imposed. Moreover, armed with a recently acquired affidavit from trial counsel (stating that he felt restricted by the state of the law), Smith argued that the sentencing jury and the trial court were not provided with other evidence of mitigation that they could have considered. The state trial court, in its order denying relief January 30, 1990, found Smith's Hitchcock claim properly before the court, but concluded that the error was harmless beyond a reasonable doubt, citing Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), and Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989). The court observed:

. . . in determining the mere utilization of the incorrect standard jury instruction was harmless error in this case, the court considered it relevant that the prosecutor in this case did not argue to the jury that it was limited to the mitigating circumstances enumerated in §921.141, Florida Statutes -- indeed, he informed them to the contrary -- and the record affirmatively demonstrated the trial judge was aware that he was required to consider non-enumerated mitigating circumstances by virtue of the state's sentencing memorandum, see Booker v. Dugger, 520 So.2d 246 (Fla. 1988), and counsel's argument on defendant's motion to dismiss. This is deemed relevant because in Hitchcock, the prosecutor apparently told the jury it could not consider mitigating factors outside those enumerated in the statute and the record in Hitchcock made it clear that the sentencing judge refused to consider the evidence pertaining to Hitchcock's character and childhood background which had been introduced by his attorney.

In the instant case, as noted previously, Mr. Padovano [defense counsel] did not introduce non-enumerated

mitigating evidence for strategic reasons. That has been judicially determined in previous proceedings after a full and fair evidentiary hearing where Mr. Padovano testified extensively on this issue, and this record provides he was aware that he could introduce all relevant evidence under Lockett and Songer.

It is clear from the prior proceedings that Mr. Padovano didn't fail to present the non-enumerated mitigating evidence because he was unaware of that evidence for he clearly was aware of that evidence. Smith v. Dugger, supra, at 795. The record also conclusively shows he didn't abstain from presenting character evidence because of his misunderstanding of the status of the law but because that was not his defense strategy. At the evidentiary hearing, Mr. Padovano testified to his decision not to present the evidence in question in the following manner:

> [Smith's] degree of participation and his degree of responsibility was both a defense to the case and a reason to mitigate the penalty . . . I couldn't go into

> court and argue for four days that this man tried to withdraw from the felony; that he didn't want to do it; that he tried to stop Johnny Copeland. And then when the jury found him guilty, go up to the jury and say: 'Well, he did it, but he was a little sick.' You can't do that. You can't have any credibility doing that kind of thing.

This is further supported by the previous ruling of this Court on the first motion to vacate that Mr. Padovano did not call character witnesses to testify at the penalty phase because he felt it could have been harmful rather than helpful and for that reason it was considered strategic judgment.

The Court concludes that in light of the foregoing that the alleged Hitchcock error is harmless beyond a reasonable doubt under Clark v. Dugger, and Clark v. State, supra.

(State trial court order denying Rule 3.850 relief, dated January 30, 1990, pages 8-9) (emphasis added).

In the instant case, in 1984, Phil Padovano, defense counsel, was challenged as rendering ineffective assistance of counsel for failing to develop mitigating evidence. Specifically, in Claim VIII of Smith's first Rule 3.850 motion, now known to be the Hitchcock issue, he observed that the trial court:

> . . . limited consideration of mitigating circumstances to those specifically enumerated in the Florida capital sentencing statute. See Fla.Stat. §921.141(6). It thereby violated Mr. Smith's Eighth Amendment rights under Eddings v. Oklahoma, 455 U.S. 1094 (1982), since it precluded consideration of nonstatutory mitigating evidence. See also Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982).
>
> The trial court's instructions on mitigating circumstances, in their entirety, failed to guide the jury's discretion respecting the application and use of mitigating circumstances. Similarly, the trial court limited itself to

those circumstances enumerated in Florida Statute §921.141(6). (R 552). It thereby failed to consider nonstatutory mitigating circumstances in violation of Eddings, supra.

Sufficient mitigating circumstances were raised during the trial: Mr. Smith's status as an accomplice who did not actually kill Sheila Porter (R 2318-19, 2273), Mr. Smith's withdrawal from the offense before Sheila Porter was killed (R 2266-68, 2273, 2314, 2318-19), Mr. Smith's diminished capacity due to the consumption of alcohol at the time of the offense (R 2255, 2761), Mr. Smith's lack of intent to kill (R 2266-68, 2272-73, 2314), and Smith's age (R 552). See also Statement of Facts respecting the August 27th trial, supra. Of these, the trial court considered only one -- age (R 552).

The trial court's finding failed to mention any consideration of nonstatutory mitigating circumstances (R 552-3). Neither did the court's instructions identify such circumstances were before the jury or indicate to the jury that nonstatutory mitigating circumstances could be considered (R 2767). Thus,

> both the trial court and the jury were limited in the exercise of their discretion at sentencing.

(First Motion for Post-Conviction Relief, page 66-67).

In the original 3.850 motion, Smith presented summaries of potential witnesses who could have been called by Phil Padovano to present nonstatutory mitigating evidence. At that point, Smith was challenging the effectiveness of Phil Padovano with regard to the penalty phase as follows:

> . . . finally, the evidence would have corroborated and enhanced mitigating circumstances of withdrawal and lack of intent to kill. The information counsel failed to discover, prepare and present would have rebutted Florida Statute §921.141(5)(b), (d), (e), (f), (h) and (i), aggravating circumstances. It also would have presented sufficient evidence of the Florida Statute §921.141(6)(b), (d), (e) and (f), statutory mitigating circumstances and

> would have heightened the emphasis placed on §921.141(6)(a), mitigating circumstance in sentencing deliberations. Most importantly, this evidence presents a wealth of nonstatutory mitigating factors which were not presented at sentencing. This evidence demonstrates that Frank Smith was not an individual for whom a sentence of death was appropriate.

(Motion for Post-Conviction Relief, pages 77-78) [Emphasis added].

The aforenoted is just an example of the accusations made against Phil Padovano with regard to his failure to present witnesses who would have come forward with "other mitigating evidence." Pursuant to said allegations, an evidentiary hearing was held October 9, 1984, at which time Phil Padovano took the stand as a court witness and testified with regard to his strategy and handling of both the guilt and penalty phases of Smith's trial.

During the course of his testimony, he was asked whether he felt restricted with regard to the presentation of nonstatutory mitigating evidence and replied:

> Because of the time, we were operating under a court decision in Florida which said that you had to stick to statutory mitigating circumstances. Since then -- and withdrawal was not one of them.
>
> Since then, the United States Supreme Court has held that that's unconstitutional. Then the Supreme Court of Florida wrote an opinion which said: Well, that's not what we really say anyway. But at the time I was following the law that was existent then. I wasn't going to present another -- I guess I could have done it and had Judge Cooksey tell me: No, that's the law. You can't do it.

(Evidentiary Hearing held October 9, 1984, pages 83-84).

While Phil Padovano was able to recall his strategy and tactics for

calling and not calling certain witnesses, the record bears out that Phil Padovano's memory in 1984 was flawed as to what he actually knew or did at Smith's trial in 1979. The trial record from 1979 reflects that not only did Phil Padovano understand and "not feel limited" by what nonstatutory mitigating evidence he may present but he argued same and informed the trial judge of the recent decision in Songer v. State, 365 So.2d 696 (Fla. 1978), pretrial.

On January 31, 1979, approximately seven months prior to trial, Phil Padovano filed a motion to dismiss asserting that, pursuant to Lockett v. Ohio, 438 U.S. 586 (1978), the "failure to allow the presentation of nonstatutory mitigating evidence renders the death penalty unconstitutional." (R

44). During the course of the hearing held on the motions on February 21, 1979, approximately six months prior to trial, Phil Padovano presented an argument acknowledging the issuance of Songer v. State, supra, and asserted that Florida's death penalty statute was unconstitutional because it restricted the consideration of non-statutory mitigating evidence notwithstanding Songer. Mr. Padovano observed:

> Unfortunately for my argument, Your Honor, I will tell you this in all candor, the Florida Supreme Court ruled about two weeks ago in the case of Sanger v. State [sic] that they really didn't say what they previously stated in State v. Cooper, and that the Florida Statute doesn't preclude consideration of nonstatutory mitigating circumstances. So again I would submit that argument. I want to let you know what it is but, I also want to let you know in all candor that several weeks ago the Supreme

> Court ruled against our position on that argument.

(Original Trial Record, pages 137-138).

Three months prior to Smith's trial, the Florida Legislature passed Chapter 79-353, modifying §921.141, Florida Statutes, to read in part:

> . . . in the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in §§(5) and (6). . . .

At the time of Smith's trial, defense counsel knew the state of the law; to-wit: Songer did not limit him to the presentation of mitigation found in the statute. He also was aware that the statute specifically provided no limitation with regard to mitigation based on the change in the statute three months prior to Smith's trial.

At the 1984 evidentiary hearing, Phil Padovano testified that he had a strategy at trial and he believed this strategy was valid at the penalty phase and likely to result in a life recommendation. Throughout trial, Padovano had asserted Smith did not kill Sheila Porter. He argued Smith withdrew from any criminal endeavor after the underlying felonies were committed. Padovano stated that his strategy was solidified when, during the jury's penalty phase deliberations, they returned and asked the question as to whether Smith had to personally pull the trigger. (Evidentiary Hearing held October 9, 1984, pages 39-40).

Padovano also secured the services of a Dr. Wallace Kennedy, a psychologist who examined Smith and returned with a report that Smith was a "secondary

psychopath." Padovano indicated that he thought about using Kennedy but after the explanation in his report, believed Kennedy would be more harmful than good as a witness. (Evidentiary Hearing held October 9, 1984, pages 45-46, 102). With regard to calling other witnesses in behalf of Frank Smith, Padovano indicated he talked with other family members and did not feel that Smith's background, which was deprived and poor, would have mattered based on his strategy to go for a withdrawal defense at the penalty phase. (Evidentiary Hearing held October 9, 1984, pages 44, 62, 64, 78, 95, 98, 103). Padovano indicated that the jury's question influenced his decision whether to call witnesses at the penalty phase and that "if he thought it would have been helpful he would have done it."

(Evidentiary Hearing held October 9, 1984, page 65).

The federal district court observed:

> As petitioner points out, there was evidence in the record from which the jury could have concluded that: (1) Smith was not the triggerman who killed the victim; (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; (3) Smith was guilty under the felony murder doctrine; (4) a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence with eligibility for parole after 8 or 10 years, even though he too was guilty of the same three underlying felonies; and (5) Smith may have been intoxicated at the time of the offense.

[A30-A31].

That court, however, went beyond the findings that existed at trial, by pointing to "substantial non-record nonstatutory mitigating evidence which could have been presented 'had the

teachings of Hitchcock been available at the time of Smith's trial.'" The court observed:

> For example, petitioner has filed affidavits, letters, and reports which indicate, inter alia, that defendant: (1) had a long term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age fifteen; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.
>
> While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the State neither addresses this

> alleged record mitigating evidence nor explains why this Court might find such evidence to be insubstantial or incredible. As to the proffered 'non-record' nonstatutory mitigating evidence, the State neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence.

[A31-A33].

Without acknowledging the state of confusion which currently exists in the Eleventh Circuit among different panels of that court as to exactly what standard should be applied in assessing whether relief should be forthcoming pursuant to a "valid" Hitchcock claim, the court merely aped the Chapman standard. This was done without acknowledging the failure of the district court to apply an appropriate standard or weigh the fact that the

state court's using the Chapman standard had found the Hitchcock error harmless beyond a reasonable doubt.

There are various panel opinions emanating from the Eleventh Circuit regarding Hitchcock error which have applied different legal standards in resolving the claim. See, e.g., Tafero v. Dugger, 873 F.2d at 252, n.5 ("we are aware of conflicting viewpoints in this circuit concerning the application of a harmless Hitchcock error standard,"); Delap v. Dugger, 890 F.2d at 306, n.23 ("there is some disagreement in this circuit as to the proper role of the habeas court in weighing aggravating and mitigating evidence in a Hitchcock situation,"); Demps v. Dugger, 874 F.2d 1385, 1393 (Johnson, J., concurring and dissenting) ("the Knight decision leaves little room for the application of

harmless error analysis, except in a situation where no nonstatutory mitigating evidence would have been proffered, see Clark, supra"); Demps v. Dugger, 874 F.2d 1385, 1395 (Clark, J., concurring) ("this Court does not undertake the task of weighing the nonstatutory mitigating evidence against statutory aggravating circumstances to determine whether the evidence would have persuaded the jury to recommend life."). See also Judges Kravitch's and Hatchett's decision in Tafero v. Dugger, 873 F.2d at 252, n.4 (Hitchcock error harmless when excluded mitigating weighed against overwhelming evidence in aggravation); and Judge Fay's decision in Demps v. Dugger, supra.

The federal district court had difficulty in discerning the proper test of the Eleventh Circuit when he opined:

> Mindful that there are no precise guidelines for determining harmlessness in a Hitchcock context, see Demps, 874 F.2d at 1385 (all three judges on the panel wrote separate opinions about how to analyze the Hitchcock claim), the Court finds instructive, a review of Eleventh Circuit cases involving Hitchcock claims.

[A17]. The district court then fashioned "its" standard as follows:

> A synthesis of the above-cited cases leaves this Court to conclude that, in reviewing a Hitchcock claim, a federal district court must first determine whether there was any credible nonstatutory mitigating evidence that the jury either did hear or could have heard had the teachings of Hitchcock and its progeny been known at the time. If, after reviewing the entire record, the Court concludes that petitioner has failed to produce or proffer any credible nonstatutory mitigating evidence, then the Court must find that the Hitchcock error, if any, was harmless. If, as here, petitioner produces substantial mitigating evidence, the federal district court will likely find the

> exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the State to rebut. It is only when petitioner produces some, but not substantial, mitigating evidence that the district court's role is unclear. Indeed, the Eleventh Circuit has more than once eluded to conflicting viewpoints about the role of the habeas court in such a situation. See Tafero 873 F.2d at 252, n.5; Delap, 890 F.2d at 306, n.23.

[A26-A27].

REASONS FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED TO ALLOW THIS COURT TO DECIDE THE STANDARD TO BE APPLIED IN DETERMINING THE HARMLESSNESS OF ANY VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978), AND HITCHCOCK v. DUGGER, 481 U.S. 393 (1987), AN ISSUE WHICH THE CIRCUIT COURT BELOW DECLINED TO ADDRESS BASED UPON THE FACT THAT THE MATTER WAS LEFT UNRESOLVED IN THE ORIGINAL OPINION AND CURRENTLY IS THE SOURCE OF IRRECONCILABLE CONFLICT BETWEEN THE STATE AND FEDERAL COURT BELOW

In Hitchcock v. Dugger, 481 U.S. 393 (1987), this Court vacated the sentence of death before it, because it was clear from the record that, in violation of Lockett v. Ohio, 438 U.S. 586 (1978), instructions were given that may have prevented the Florida advisory jury and the sentencing judge from considering evidence of nonstatutory mitigation actually presented to them. This Court opined that the Respondent, the State of Florida, had made no

attempt to argue that the error was harmless or that it had had no effect upon the jury or the sentencing judge, and that, as a result, the sentence of death had to be invalidated. Hitchcock v. Dugger, 481 U.S. at 399-400. In light of the fact that most of the "Hitchcock" claims occurred in Florida and are reviewed by the Eleventh Circuit Court of Appeals, most of the federal caselaw regarding Hitchcock claims emanate from that circuit. Unfortunately, the Eleventh Circuit, in analyzing the harmfulness of a Lockett/Hitchcock error, has been unable to develop a standard of review for harmlessness which is uniformly used in said circuit. In contrast, the Florida Supreme Court has adopted a valid and workable harmless error analysis which involves a detailed consideration of all

the evidence in aggravation and mitigation presented to the sentencer at the time of sentencing, and a determination as to the effect the allegedly unconsidered evidence would have had on the jury's recommendation and the judge's ultimate sentence. In contrast, the Eleventh Circuit has granted relief in virtually every case in which a Hitchcock claim has been presented, including a number of cases such as the instant case, where the state courts have reached the opposite conclusion. Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991); Aldridge v. Dugger, 925 F.2d 1320 (11th Cir. 1991); Booker v. Dugger, 922 F.2d 633 (11th Cir. 1991); Demps v. Dugger, 874 F.2d 1385 (11th Cir. 1989); Delap v. Dugger, 890 F.2d 285 (11th Cir. 1990); Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989);

Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989); Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (en banc); Messer v. Florida, 834 F.2d 890 (11th Cir. 1987); Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988), and Gore v. Dugger, 933 F.2d 904 (11th Cir. 1991). As will be demonstrated below, the Eleventh Circuit has absolutely no uniform standard by which the harmfulness of a Hitchcock error is determined, and the standard applied in the instant case, albeit Chapman v. California, supra, has been cited, cannot guarantee a proper Chapman analysis has been done in light of the

fact that the Eleventh Circuit, in its summary opinion, observed that the "district court faithfully applied . . . this circuit's precedents to the facts." Such a conclusion is totally incredible in light of the fact that the district court acknowledged confusion with regard to the Eleventh Circuit's "precedents" and as a result fashioned its own "harmless error analysis test." Indeed, in Gore v. Dugger, supra, the Eleventh Circuit, in a summary opinion, acknowledged the lack of agreement within the circuit on the scope of Lockett/Hitchcock harmless error analysis. It then offered the incredible observation that it did not need to "wrestle" with the issue of the proper scope of the doctrine, since all three panel members had arrived, by some unknown route, at the unanimous

conclusion that the error was not harmless. The panel opinion in Gore interestingly concluded that it was expressly not adopting the federal district court's conclusions regarding the proper scope of the doctrine, the basis for said disagreement being left to the reader's imagination. In Gore, the Eleventh Circuit not only admitted it could not formulate a coherent doctrine but also declared that the articulation and application of such a doctrine was unnecessary to the determination of a harmless error analysis in a given case. In the sixteen Florida cases reviewed by the Eleventh Circuit regarding Hitchcock error, the Court of Appeals has found, in three cases, the error harmless, due to the fact that no evidence in mitigation was or apparently could have

been presented. Clark v. Dugger, supra; Tafero v. Dugger, supra, and Demps v. Dugger, supra. In four other cases, the Court of Appeals reversed with absolutely no discussion or analysis as to whether the Hitchcock error could have been harmless. Hargrave v. Dugger, supra; Messer v. Florida, supra; Stone v. Dugger, supra, and Ruffin v. Dugger, supra. In the remaining cases, including the instant case, the Court of Appeals has granted relief, based upon a finding that the Hitchcock error was not, in fact, harmless. For example, in Tafero v. Dugger, 873 F.2d at 252. n.5, the court first acknowledged that "we are aware of conflicting viewpoints in this circuit concerning the application of a harmless Hitchcock error standard," and likewise acknowledged the same in Delap v. Dugger, 890 F.2d at 306, n.23,

stating, "There is some disagreement in this circuit as to the proper role of the habeas court in weighing aggravating and mitigating evidence in a Hitchcock situation." While acknowledging different panels within the court will apply different legal standards, the court has absolutely no interest in resolving this conflict and has denied both motions for rehearing en banc which sought resolution of this conflict.

For example, it is beyond speculation that some panels of the Eleventh Circuit, in determining the harmfulness of any Hitchcock error, look to, inter alia, the strength of the counterveiling findings in aggravation, see Tafero, 873 F.2d at 252, n.4 (. . . any Hitchcock error was harmless in light of the overwhelming aggravating circumstances . . .), whereas others,

such as the panel in Booker v. Dugger, supra, dismissed out of hand any consideration of the existence of aggravating factors. See also, Knight, 863 F.2d at 710 (. . . it is clear that harmless error cannot be made out simply because multiple aggravating circumstances exist in a given case).

The other example of fundamental disagreement is whether the court will examine the weight of the excluded mitigating evidence, or whether it will automatically refuse to find harmless error where any relevant mitigating evidence is excluded. In Jackson v. Dugger, 931 F.2d at 716, the court indicated that the excluded mitigating evidence should be examined to determine if it is "significant." If so, the error could not be deemed harmless. See also Jones v. Dugger, 867 F.2d at 1279,

stating that error would be harmless where excluded evidence is "insignificant." On the other hand, in Booker v. Dugger, 922 F.2d at 635, the court reviewed its prior decisions and found that the error could be harmless where counsel purposefully refrained from presenting mitigating evidence where none was available. In other words, the exclusion of any relevant evidence precluded a finding of harmless error. See the concurring opinion of Judge Clark in Demps v. Dugger, 874 F.2d at 1395, as well as the dissenting opinion of Judge Johnson in Gore v. Dugger, supra. Not only is there no clear majority in a number of the opinions rendered, see Demps, Knight and Ruffin, but there is neither consistency nor logic found in even the most casual review of these cases.

Albeit the effects of the Eleventh Circuit's fundamental inconsistency on this issue is for the most part limited to Florida cases, the record reflects that the Eleventh Circuit has not stopped at Florida cases. See Richardson v. Thigpen, 883 F.2d 895, 897-899 (11th Cir. 1989) (Hitchcock claim raised by Alabama petitioner). Certainly, this Court has jurisdiction to grant the writ to resolve the conflict within the Eleventh Circuit, see John Hancock Insurance Co. v. Bartels, 308 U.S. 108, 181 (1939) (certiorari granted due to intracircuit conflict and importance of question presented). Moreover, because the State of Florida is irreparably prejudiced by the fact that the Court of Appeals has failed to adopt a uniform standard in resolving identical claims of error,

which the state court applying a Chapman standard has been able to resolve, certiorari should also be granted because a conflict exists between the state supreme court and the federal courts of appeal with regard to the application of a known standard to an unchanging set of facts. See Baldwin v. Alabama, 472 U.S. 372 (1985) (certiorari granted because conflict between state supreme court and federal court of appeals).

Sub judice, the Florida Supreme Court in a well articulated opinion, found that the same set of facts reviewed by the Eleventh Circuit under a Chapman analysis resulted in a harmless Hitchcock error. The federal district court, in reviewing the same record and nonplussed by what standard it should use on the federal level, fashioned its

own standard which was totally erroneous. The Eleventh Circuit, in a summary affirmance of the granting of the writ, unbelievably stated that the district court had faithfully followed prior Eleventh Circuit decisions. But for the Florida court's uniform application of the Chapman standard, nothing was faithfully followed in the instant case. The reasoning set forth by the district court is fatally flawed, as well as the Eleventh Circuit's "analysis" under the Chapman standard. In deciding whether there was a probability there was a Hitchcock violation that could have impacted the jury's recommended sentence, the inquiry should have centered on what was presented in 1979, not what collateral counsel asserts years later could have been presented in 1979 (especially where

a tactical decision was made by Phil Padovano to limit presentation of evidence). The record in this case clearly demonstrates that in 1979 defense counsel knew about Lockett v. Ohio, supra (he filed a pretrial pleading regarding same); argued to the trial jury and the court that statutory mitigation existed and, if the jury did not consider it as statutory mitigation, it should consider it for whatever it was worth; investigated the facts and circumstances surrounding Frank Smith's life and ultimately presented no mitigating evidence at the penalty phase, because defense counsel relied on the "lingering doubt" the jury seemed to possess based on questions asked by the jury with regard to whether Smith had to be the triggerman. The district court's reliance on "substantial nonrecord,

nonstatutory mitigating evidence which 'could have been presented had the teachings of Hitchcock been available at the time of Smith's trial'" can never be the basis upon which to determine whether a Hitchcock jury instruction error probably would have impacted the jury. Lest we forget, the teaching of Hitchcock merely expanded the proclamation of Lockett v. Ohio, supra.

In the instant case, Phil Padovano, defense counsel, testified at the 1984 evidentiary hearing regarding counsel's representation at the penalty phase, that he had a strategy at trial that he believed was valid at the penalty phase and likely to result in a life recommendation. Throughout trial, Padovano had asserted Smith did not kill Sheila Porter. He argued Smith withdrew from any criminal endeavor after the

underlying felonies were committed. Padovano stated that his strategy was solidified when, during the jury's penalty phase deliberations, the jury returned and asked the question whether Smith had to personally pull the trigger. Facts and circumstances known to Phil Padovano in 1979 are the only factors in mitigation that may be considered in assessing whether a true Hitchcock violation occurred.

Phil Padovano argued to the jury that factors discerned at trial were of a nonstatutory mitigating nature. That mitigation was rejected by the jury and rejected by the trial judge. It cannot be described as substantial in light of the totality of this record. As to the proffered nonrecord, nonstatutory mitigating evidence that came forth in 1984 and again in 1990, it is not

susceptible to scrutiny or discussion because it had no impact (it was never presented to the jury or the judge) and should not have been considered in reviewing whether Phil Padovano, in 1979, believed he was restricted in the presentation of nonstatutory mitigating evidence. It should be further observed that the very nonstatutory mitigating evidence proffered in 1990 was the nonstatutory mitigating evidence presented in 1984 when Phil Padovano's representation of Frank Smith was under attack. Smith argued Padovano rendered ineffective assistance of counsel for failing to present this evidence in the 1978 penalty phase. The allegation was never that he was restricted in the presentation of said evidence, but rather, that he failed to make a complete investigation of same. The

reason this issue is important is because both the state and the federal courts, including the district court below and the Eleventh Circuit, held that Phil Padovano did investigate, and in fact had a strategy with regard to what mitigation would be presented to the jury in 1978.

To allow nonrecord, nonstatutory mitigating evidence not presented to the jury and judge to be included in the weighing factor in assessing harmless error renders any analysis meaningless. A harmless error analysis can only be made with regard to what is known at the time the error occurred. The district court was in total error in including and factoring in nonrecord, nonstatutory mitigating evidence in its creation of the standard to be applied "based on the teachings of Hitchcock." Moreover, the

Eleventh Circuit, in its summary affirmance of same, failed to conduct any kind of analysis and merely regurgitated a citation to Chapman v. California, supra. The federal district court stated, and the Eleventh Circuit ratified the proclamation in the instant case, that because Smith now produced substantial mitigating evidence, the federal district court "will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the State to rebut." Beyond peradventure, this standard is one that can never be satisfied by the State.

Recently, this Court chided the State of Florida, in particular the Florida Supreme Court, for its failure to fully articulate its reasons in conducting a harmless error analysis.

See Sochor v. Florida, 504 U.S. ___, 119 L.Ed.2d 326, 112 S.Ct. ___ (1992). The court observed:

> Although we do not mean here to require a particular formulaic indication by state courts before their review for harmless federal error will pass federal scrutiny, a plain statement that the judgment survives on such an inquiry is clearly preferrable to asllusions by citation. In any event, when the citations stop as far short of clarity as these do, they cannot even arguably substitute for explicit language signifying that the State Supreme Court reviewed for harmless error.

119 L.Ed.2d at 342.

Likewise, the State would demand that the federal courts do an appropriate analysis when applying a harmless error assessment after the state court has done so with clarity and with the same federal standard but reached a contrary result to the federal courts. As observed by Justice O'Connor

in her concurring opinion in Sochor, ". . . an appellate court's bald assertion that an error of constitutional dimensions was 'harmless' (harmful) cannot substitute for a principled explanation of how the court reached that conclusion." 119 L.Ed.2d at 342. See also Satterwhite v. Texas, 486 U.S. 249, 258 (1988) (harmless error analysis applies to penalty phase of capital case, albeit "the evaluation of consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer").

CONCLUSION

WHEREFORE, for the aforementioned reasons, Petitioner respectfully prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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Case No. _____

SUPREME COURT OF THE UNITED STATES
October Term 1992

HARRY K. SINGLETARY,

Petitioner,

v.

FRANK ELIJAH SMITH,

Respondent.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-3831

D.C. Docket No. 90-40035

FRANK ELIJAH SMITH,

Petitioner-Appellee,
Cross-Appellant,

versus

HARRY K. SINGLETARY,

Respondent-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(August 18, 1992)

Before TJOFLAT, Chief Judge, HATCHETT and EDMONDSON, Circuit Judges.

PER CURIAM:

In this capital case, the state trial judge prevented defense counsel from presenting and the jury from considering mitigating circumstances not listed in the Florida death penalty statute. Fla.Stat. §921.141. The district court ruled that this Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), error was not harmless beyond a reasonable doubt. Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990).

Our review indicates that the record well supports the district court's findings of fact, and the district court faithfully applied the Supreme Court's and this circuit's precedents to the facts. This court is unable to say that the Hitchcock error is not harmful beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Accordingly, the district court is affirmed.*

AFFIRMED

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* The history of this case is found at Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); Smith v. State, 457 So.2d 1380 (Fla. 1984); Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988); Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989); Smith v. State, 556 So.2d 1096 (Fla. 1990); and Smith v. Dugger, 493 U.S. 1064 (1990).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FRANK SMITH,

Petitioner,

v. TCA 90-40035-WS

RICHARD L. DUGGER, et al., ORDER

Respondents.

This cause is before the court upon Frank Smith's second petition for writ of habeas corpus (document 1). Due to the important constitutional matters here presented, I feel obliged to set forth in detail my analysis for the benefit of those charged with the inevitable review of my decision in the federal appellate process.

I. BACKGROUND

A. Facts

The facts leading to Smith's conviction are well documented in the voluminous record of this brutal murder case. Briefly, on the evening of December 12, 1978, Smith, along with two accomplices, Johnny Copeland and Victor Hall, robbed a convenience store in Wakulla County, Florida. They then abducted the store clerk, Sheila Porter, and took her to a motel where they each committed sexual battery upon her. Victor Hall testified that the three men later drove Ms. Porter to a wooded area. There, Hall waited in the car while Smith and Copeland took her into the woods. Hall testified that he heard three gunshots, after which Copeland and Smith returned to the car alone. Sheila Porter's body was found two days later

with three bullet wounds in the back of her head.

B. Procedural History

Found guilty of robbery, kidnapping, sexual battery, and first-degree murder, Smith was sentenced to death in accordance with the jury's recommendation. The sentencing judge found and weighed the following six aggravating factors --

> (1) That the defendant had two prior convictions for violent felonies (robberies).
>
> (2) That the murder was committed in the course of an enumerated felony (kidnapping).
>
> (3) That the murder was committed to avoid arrest.
>
> (4) That the murder was committed for pecuniary gain.
>
> (5) That the murder was heinous, atrocious and cruel.
>
> (6) That the murder was cold, calculated and premeditated --

against only one mitigating factor -- that Smith was nineteen (19) years of age when the crime was committed.

Smith appealed his conviction and death sentence to the Florida Supreme Court. Finding no reversible error, the state supreme court affirmed Smith's convictions and death sentence, and certiorari review was subsequently denied. Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983).

The Governor of Florida denied Smith clemency and signed a warrant scheduling his execution. Smith then filed motions in the state trial court seeking a stay of execution and post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The trial court refused to grant a stay and denied

Smith's 3.850 motion. The Florida Supreme Court affirmed the denial of post-conviction relief and further denied Smith's original petition for a writ of habeas corpus raising the single issue of ineffective assistance of appellate counsel. Smith v. State, 457 So.2d 1380 (Fla. 1984).

On October 13, 1984, Smith filed a petition for writ of habeas corpus in this court. Having stayed Smith's execution to permit time for consideration of his petition, this court held that the first ten of Smith's eighteen claims were procedurally barred. The remaining eight claims were denied on the merits without further evidentiary proceedings.

Raising six issues, Smith appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed

this court's decision after finding no violation of Smith's constitutional rights. Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988). Smith thereafter filed a petition for rehearing in which he raised, inter alia, a claim under Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Hitchcock was decided by the United States Supreme Court after this court's decision and while Smith's case was on appeal in the Eleventh Circuit. Rehearing was subsequently denied but without prejudice to Smith's presenting his unexhausted Hitchcock claim to the Florida state courts. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989). The Eleventh Circuit made clear that Smith's unexhausted Hitchcock claim was not foreclosed from federal review in a subsequent action, after exhaustion.

Smith filed a timely petition for certiorari which is currently pending in the U.S. Supreme Court.

On July 31, 1989, Smith filed a second Rule 3.850 motion in state trial court. He raised twelve (12) claims, including a claim of error under Hitchcock. All claims but one were found to be procedurally barred. The one exception -- Smith's Hitchcock claim -- was denied on the merits. On appeal, the Florida Supreme Court held that, while the trial court's instructions to the jury indeed violated Hitchcock, such error was harmless beyond a reasonable doubt. All other claims were found to be procedurally barred. Smith v. State, 556 So.2d 1096 (Fla. 1990).

While Smith's Hitchcock claim was still being considered in the Florida

courts, the Governor of Florida issued a second death warrant, setting Smith's execution for 7:00 a.m. on February 9, 1990. After the Florida Supreme Court denied all relief on February 8, 1990, but before his scheduled execution the following morning, Smith filed with this court a motion for stay of execution along with his second petition for writ of habeas corpus. With but a few short hours before Smith's scheduled early morning execution, and needing time to give proper consideration to both Smith's 176-page petition for writ of habeas corpus as well as the state's response, the court granted Smith's request for a stay. A complete, orderly record has now been compiled in this court, and Smith's claims are ripe for review.

II. THE HITCHCOCK CLAIM

Relying on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), petitioner first contends that the jury and the judge in the state trial court were unconstitutionally precluded from considering -- and defense counsel from presenting -- mitigating circumstances not enumerated in the Florida death penalty statute. Fla.Stat. §921.141. In Lockett, the Supreme Court concluded that the eighth and fourteenth amendments require a sentencer to consider all relevant mitigating evidence in capital cases. Despite Lockett, the advisory jury in Hitchcock was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances.

The Supreme Court found that, in the absence of a showing that the error was harmless, such exclusion of mitigating evidence rendered Hitchcock's death sentence invalid. The Court reiterated its holding in Lockett that the eighth amendment, applicable to the states through the fourteenth amendment, requires that a capital sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death.

In this case, the state trial judge gave virtually the same instruction as that given in Hitchcock. At the conclusion of the penalty phase, the trial judge instructed the jury: The mitigating circumstances which you may consider, if established by the

evidence, are these: [listing the seven statutory mitigating circumstances enumerated in the Florida death penalty statute]." In Hitchcock, the trial judge instructed: "The mitigating circumstances which you may consider shall be the following: [listing the same seven statutory mitigating circumstances]." As in Hitchcock, the jury in this case was directed to consider only statutory factors in mitigation. As in Hitchcock, then, the jury instruction given in this case violated petitioner's eight amendment right to "present any and all relevant mitigating evidence that is available." Hitchcock, 95 L.Ed.2d at 353 (quoting Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)).

While conceding that the trial court's instruction was erroneous, the

state respondent here argues that both the trial court and the Florida Supreme Court were correct in concluding that the error was harmless. The Eleventh Circuit has said that a Hitchcock violation is subject to harmless error analysis. Demps v. Dugger, 874 F.2d 1385, 1389 n.12 (11th Cir. 1989) (citing cases), cert. denied, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Such analysis is governed by the strict "harmless beyond a reasonable doubt" standard enunciated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under Chapman, the court must presume prejudice unless and until the state proves beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation. See Brown v. Dugger, 831 F.2d 1547 (11th

Cir. 1987) (discussing Chapman standard where constitutionally-proscribed evidence was admitted at trial). If there remains any possibility that the jury's sentencing decision was affected by the erroneous jury instruction, and if the state cannot refute that possibility, the error cannot be deemed harmless.

While state court factual findings are entitled to a presumption of correctness under 28 U.S.C. §2254(d), harmlessness of a constitutionally erroneous jury instruction is not an issue of fact entitled to such a presumption. It is, instead, a mixed question of law and fact meriting independent consideration by a federal habeas court. This court, therefore, cannot simply defer to the state courts' findings of harmlessness. See, e.g.,

Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (finding Hitchcock error not harmless despite state courts' findings to the contrary).

Mindful that there are no precise guidelines for determining harmlessness in a Hitchcock context, see Demps, 874 F.2d at 1385 (all three judges on the panel wrote separate opinions about how to analyze the Hitchcock claim), the court finds instructive, a review of Eleventh Circuit cases involving Hitchock claims.

In Demps, the petitioner was sentenced to death for the killing of a fellow prison inmate. Demps challenged his sentence on Hitchcock grounds, arguing that his jury was impermissibly precluded from considering nonstatutory mitigating circumstances. The Eleventh Circuit panel agreed, the trial judge

having given an instruction virtually identical to the one erroneously given in Hitchcock.

Judge Fay, writing the lead opinion, examined each of the four types of evidence which Demps alleged would have influenced the jury to recommend life, determined that none of the evidence excluded from the jury's consideration would have affected its sentencing recommendation, and thus concluded that any error which may have occurred was harmless. Judge Fay emphasized that, in evaluating whether a Hitchcock error is harmless, a court must -- after an in-depth review of the entire record -- "determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence." Demps, 874 F.2d at 1390.

Judge Clark agreed with Judge Fay that Demps was not entitled to a new sentencing hearing as a result of the erroneous Hitchcock instruction. He was unable to agree with Judge Fay, however, that a harmless error analysis was appropriate. Judge Clark opined that, "[w]here there is no nonstatutory mitigating evidence there can be no Hitchcock error and harmlessness need not be considered." Id. at 1396. Because he concluded that Demps failed to present even arguably credible evidence of nonstatutory mitigating circumstances, Judge Clark did not believe that the court needed to engage in harmless error analysis. He did suggest, however, that a case should be returned to the state court for resentencing if any credible nonstatutory evidence exists, whether

such evidence was heard but excluded from consideration or whether it was not even offered because Florida law at the time taught that such evidence was not admissible. Id. at 1395.

Largely because he felt the record contained no factual findings on Demps's claims of mitigating evidence, Judge Johnson dissented from the majority's finding that Demps was not entitled to a resentencing hearing under Hitchcock. Judge Johnson believed that the case should be remanded to the district court for findings as to the truthfulness of Demps's claims. If the district court were to find that Demps had no true mitigating evidence to offer, Judge Johnson would concede that any error in the jury instructions was harmless. If, on the other hand, the district court were to find any of Demps's claims of

mitigating evidence to be true, then Judge Johnson would conclude that excluding the evidence from the jury's consideration would have constituted reversible error.

Citing Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988), Judge Johnson stressed that there is a narrow range of situations in which Hitchcock error may be harmless. In Knight, respondent argued that any Hitchcock error was harmless because "so many aggravating factors were found (four) that no amount of nonstatutory mitigating evidence could change the result in this case." 863 F.2d at 710. In rejecting the state's reasoning, the Eleventh Circuit held:

> No authority has been furnished for this proposition and it seems doubtful that any exists. The State's theory, in practice, would do away with the requirement of an

> individualized sentencing determination in cases where there are many aggravating circumstances. It is this requirement, of course, that is at the heart of Lockett and its progeny. . . .
>
> While we are not prepared to definitively state what might constitute harmless error in the Lockett context, it is clear that harmless error cannot be made out simply because multiple aggravating circumstances exist in a given case.

Id. To paraphrase Judge Johnson, the Knight decision leaves little room for the application of harmless error analysis except in two limited situations: (1) where the defense produces no nonstatutory mitigating evidence, and (2) where the nonstatutory mitigating evidence presented is so insignificant that it would not have altered the jury's decision. See Demps, 874 at 1393 (Judge Johnson, dissenting); Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989).

The Eleventh Circuit has found Hitchcock error to be harmless only three times. See Demps, 874 F.2d at 1385 (error harmless where petitioner failed to present any credible evidence of mitigating circumstances); Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989) (error harmless where defense counsel purposely presented no mitigating evidence for strategic reasons), cert. denied; Clark v. Dugger, 834 F.2d 1561, 1569-70 (11th Cir. 1987) (error harmless where "there simply were no nonstatutory mitigating circumstances to consider"), cert. denied, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). In contrast, the court has many times granted relief on Hitchcock/Lockett grounds. See, e.g., Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (error not harmless where there was significant

psychological evidence which the jury, if it followed the court's erroneous Hitchcock instruction, would have considered only if it rose to the level of a statutory mitigating factor -- i.e., only if the jury found that Delap committed the crime "under the influence of extreme mental or emotional disturbance"); Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) (error not harmless where there was mitigating evidence in the record that petitioner was a model prisoner and "a very nice person [who] got along well with people [and] was never no trouble"); Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) (error not harmless where there was mitigating evidence in the record about petitioner's mental state and his troubled family background, and the state argued only that the

Hitchcock/Lockett error was harmless because there were multiple aggravating circumstances); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) (granting relief on Hitchcock/Lockett claim, without discussion of harmlessness, where there was evidence in the record of petitioner's mental state, his lack of an adult criminal record, and the alleged domination of petitioner by his accomplice), cert. denied, 10 S.Ct. 872, 102 L.Ed.2d 995 (1989); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (error not harmless where there was evidence in the record that petitioner felt remorse for his actions); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (granting relief on Hitchcock-Lockett claim, without discussion of harmlessness, where there was mitigating evidence in the record of petitioner's

steady employment, below-average intelligence, and history of drug abuse), cert. denied, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989).

A synthesis of the above-cited cases leads this court to conclude that, in reviewing a Hitchcock claim, a federal district court must first determine whether there was any credible nonstatutory mitigating evidence that the jury either did hear or could have heard had the teachings of Hitchcock and its progeny been known at the time. If, after reviewing the entire record, the court concludes that petitioner has failed to produce or proffer any credible nonstatutory mitigating evidence, then the court must find that the Hitchcock error, if any, was harmless. If, as here, petitioner produces substantial mitigating

evidence, the federal district court will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the state to rebut. It is only when petitioner produces some, but not substantial mitigating evidence that the district court's role is unclear. Indeed, the Eleventh Circuit has more than once alluded to conflicting viewpoints about the role of the habeas court in such a situation. See Tafero, 873 F.2d at 252 n.5; Delap, 890 F.2d at 306 n.23.

In this case, as mentioned previously, the state urges the court to deny all relief on the basis of harmless error. The thrust of the state's argument, however, is difficult to discern. On the one hand, the state suggests that defense counsel did, in

fact, argue to the jury several alleged mitigating factors which did not fit clearly within the confines of the enumerated statutory factors. The state notes, for example, that defense counsel included in his arguments to the jury that (1) the defendant did not personally kill the victim, (2) the defendant was fifteen years old when he committed his prior robberies, (3) the defendant has been drinking gin and smoking marijuana the evening of the crime, and (4) the defendant was influenced by the dominant personality of his accomplice. The state writes:

> Clearly from the tone of the closing arguments presented, [defense counsel] intended those jurors to consider the minuteness of evidence in relationship to those mitigating factors. He was desirous that the jury and judge find statutory mitigation but he made it perfectly clear that the slightest evidence in "mitigation" be considered.

Document 7, p. 35 (emphasis in original).

If the state is suggesting that the Hitchcock error is harmless because defense counsel could and did, both present and argue, nonstatutory mitigating factors, the suggestion must be rejected. The Eleventh Circuit has made it abundantly clear that the actual introduction of nonstatutory mitigating evidence is meaningless if the jury is instructed not to consider such evidence. Delap, 890 F.2d at 304 (citing cases). Furthermore, the error is not rendered harmless just because the judge himself hears and considers nonstatutory mitigation. Jones, 867 F.2d at 1280 ("[A] trial court cannot, by specifically considering nonstatutory mitigating evidence, cleanse a jury recommendation which is tainted by

Lockett error"); Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987). It follows, then, that the error does not become harmless just because the state trial judge later states -- as he did in this case -- that "[e]ven if the court had been presented all of this alleged mitigating evidence now being offered by the defendant, it would have in no way altered my decision to impose the death penalty." See document 7, p. 35.

The state also suggests that this case is similar to Clark and Tafero, both of which resulted in findings of harmlessness because there were no mitigating factors. If, by drawing an analogy to Clark and Tafero, the state is suggesting that there simply is no nonstatutory mitigating evidence in this case, the record belies such suggestion. As petitioner points out, there was

evidence in the record from which the jury could have concluded that: (1) Smith was not the triggerman who killed the victim; (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; (3) Smith was guilty under the felony murder doctrine; (4) a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even though he too was guilty of the same three underlying felonies; and (5) Smith may have been intoxicated at the time of the offense.

Petitioner also indicates that there was substantial "nonrecord" nonstatutory mitigating evidence which could have been presented had the teachings of Hitchcock been available at the time of Smith's trial. For example,

petitioner has filed affidavits, letters, and reports which indicate, inter alia, that defendant: (1) had a long-term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the state neither addresses this alleged record mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible. As to the proffered "nonrecord" nonstatutory mitigating evidence, the state neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence.

Instead, the state directs the court's attention to the fact that a Lockett issue was the basis for a previous unsuccessful attack on trial counsel's representation under

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The state writes: "Necessarily in finding [defense counsel] made tactical decisions in the presentation of mitigating evidence at the penalty phase of the 1979 trial, and finding no prejudice under Strickland v. Washington, the harmless error analysis regarding Hitchcock is made much simpler." Document 7, p. 30. Presumably, the state wants the court to ignore the proffered evidence because the court previously found, in a Strickland setting, that counsel chose not to present mitigating evidence for strategic reasons. Such finding allowed this court, as well as the Eleventh Circuit, to conclude (without addressing the prejudice prong of the Strickland test) that petitioner's Strickland claim was without merit.

Mindful that claims under Strickland and Hitchcock are separate and distinct, the court notes that defense counsel's tactical decisions were made in the context of the law as it then existed. The standard jury instruction promulgated under such law informed jurors that "the mitigating circumstances which you may consider, if established by the evidence, are these [listing the seven statutory mitigating factors]." The record makes it evident that counsel developed both his strategies as well as his arguments under the constraints of that jury instruction. To do so was reasonable at the time. Only later did the Supreme Court decide that it was error for the trial court to give the constraining instruction. Hitchcock, 95 L.Ed.2d at 347. That later decision did not make

counsel's prior performance ineffective under Strickland. It did, however, make it necessary for this court to now determine whether the erroneous instruction affected the jury's decision as to penalty. To make that determination, the court must look at the various types of nonstatutory mitigating factors which either were presented, or could have been presented, to the jury. Because of the change in the law, this court cannot merely ignore the evidence on the ground that defense counsel was previously found to have made a tactical decision not to present certain kinds of evidence during the penalty phase of the trial.

Perhaps the court would think differently if there were reason to believe that counsel's strategies were not affected by the erroneous

instruction. In Clark, 834 F.2d at 1566-70, for example, petitioner's ineffective assistance of counsel claim was denied because the court found that counsel -- after thorough investigation -- made a tactical decision to introduce no testimony during the penalty phase of Clark's trial. That same tactical decision was used to support the court's conclusion that the Hitchcock error was harmless. The court wrote:

> Here, however, there simply were no nonstatutory mitigating circumstances to consider. Clark did not introduce any evidence that would support the existence of a nonstatutory mitigating circumstance. As explained supra, Clark's counsel, after her investigation, made a tactical decision that any testimony at the penalty phase could only prove harmful. Thus, Clark failed to introduce any mitigating evidence whatever. . . . Having failed to produce evidence of any nonstatutory

> mitigating factors, Clark can hardly complain that the trial court restricted the jury's ability to consider them. We therefore conclude that any Hitchcock error was harmless.

834 F.2d at 1569-70. Importantly, there was no evidence that counsel's strategies would have been different had she defended the case post-Hitchcock. At the time of trial, and without the benefit of Hitchcock, she decided that there simply was no credible evidence of mitigating factors. Two years later, and despite the Hitchcock decision, there was still no credible evidence of mitigating factors. In such a case, counsel's tactical decision not to present mitigating evidence supports the court's denial of both a Strickland and a Hitchcock claim. Here, however, the situation is different.

In Smith's case, the record indicates that trial counsel, now a

state circuit judge, felt constrained by the court's erroneous instruction. In fact, as the state apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors. In addition, he has filed an affidavit describing how his strategies were limited by the instruction which he knew would be given to the jury. Perhaps most significantly, unlike in Clark, there was nonstatutory mitigating evidence in this case which either was presented or could have been presented by counsel and considered by the jury had the erroneous jury instruction not been given. In sum, the record before me suggests that counsel's strategy would have been different had the case been tried post-Hitchcock. Under such circumstances,

this court cannot accept the state's premise that the tactical decision which supported the denial of petitioner's ineffective assistance of counsel claim should, ipso facto, be used to deny petitioner's Hitchcock claim.

Because the State of Florida has placed great importance upon the advisory jury in the Florida sentencing scheme, this federal court must be especially cautious when speculating about the effect of a constitutional error on that state advisory jury. Indeed, as explained earlier, this court is required to presume prejudice unless and until the state proves beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation.

The brutal, senseless murder of Sheila Porter was a horrible crime and completely justified the finding of many aggravating factors. Yet, under the law binding upon this court, the State of Florida is required to do more than point this court to the enormity of the crime in order to defeat petitioner's claim for relief. Knight, 863 F.2d at 710 (relief granted where the state's only argument was that there were multiple aggravating circumstances justifying the imposition of the death penalty). Here, the state has done little else. My duty, then, is clear. Having determined that (a) substantial nonstatutory mitigating evidence exists in this case, (b) the state has failed to prove the harmlessness of the erroneous instruction which prevented the introduction and/or consideration of

such evidence by the state court jury, and (c) this court should not substitute its judgment for the considered judgment of a Florida jury properly instructed on sentencing under existing constitutional law, this court must GRANT conditional relief on the Hitchcock claim of petitioner Frank Smith.

III. REQUEST FOR EVIDENTIARY HEARING

The state trial court did not hold an evidentiary hearing to determine the harmfulness of the Hitchcock error in Smith's case. Had the state in any manner contested the veracity of the proffered nonstatutory mitigating evidence, or had the record been less clear about the constraining effect of the erroneous instruction on the tactics of defense counsel, this court might be obliged to hold such a hearing. As the record stands, however, the Hitchcock

issue is clearly focused for this court and can be resolved without an evidentiary hearing here. Accordingly, petitioner's request for an evidentiary hearing before this court is DENIED.

IV. OTHER CLAIMS

Smith raises five additional claims in his petition for writ of habeas corpus. Of these five claims, four (claims III - VI) were raised before the trial court in a motion for post-conviction relief. The trial court denied Smith's motion, finding that each of the four claims was procedurally barred. The Florida Supreme Court affirmed the trial court's decision, agreeing that the four claims were procedurally barred. Smith v. [sic] clearly relied on procedural bar as an independent state basis for disposition of these four claims, there can be no

federal habeas review unless Smith can show "cause" for the default and "prejudice attributable thereto." Harris v. Reed, ____ U.S. ____, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Because the court concludes that Smith has not shown adequate "cause" for his default, Claims III through VI of Smith's petition shall not be addressed here.

The remaining claim in Smith's petition -- that Smith was denied his right to a full, fair, and independent determination of his second motion for post-conviction relief -- fails to raise an issue of federal law. Smith basically complains that the trial judge

signed an order prepared by the state. While others might question the propriety of such action, federal law clearly does not require that a judge personally prepare his own orders. Review of the record indicates that a fair hearing was held (albeit not an evidentiary hearing), and there is nothing to indicate that the order, by whomever prepared, does not reflect the trial judge's ruling. Absent any error under federal law, this court will not question the procedures used by the state trial court. Finding no such error, the court concludes that Smith is not entitled to relief on Claim II of his petition for habeas corpus, and the same is DENIED.

IV. CONCLUSION

Based upon the foregoing analysis, the court concludes that petitioner has

met his burden of establishing that an erroneous jury instruction given during the course of his sentencing proceeding unconstitutionally precluded presentation and consideration of mitigating circumstances not enumerated in the Florida death penalty statute. The state has not proven beyond a reasonable doubt that the giving of this erroneous instruction to the sentencing jury was harmless. Accordingly, it is ORDERED:

The petition for writ of habeas corpus is hereby GRANTED unless the state, within a reasonable period of time, either resentences Smith in a proceeding that comports with Lockett/Hitchcock or vacates the death sentence and imposes a lesser sentence consistent with law. All other relief requested by petitioner Smith is hereby DENIED.

DONE AND ORDERED this 8th day of June, 1990.

William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

SUPREME COURT OF FLORIDA

No. 75,450

FRANK ELIJAH SMITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

[February 8, 1990]

PER CURIAM.

Frank Elijah Smith, a prisoner under sentence of death, appeals the denial of relief on his second motion filed under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, §3(b)(1), Fla.Const.

The facts of this case are fully discussed in the prior appeals and collateral challenges involving this appellant. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989), petition for cert. filed, No. 89-6347 (U.S. Dec. 29, 1989); Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988); Smith v. State, 457 So.2d 1380 (Fla. 1984); Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983). This appeal presents only a single issue that is not procedurally barred.

Smith argues that the instruction given by the trial court in this instance, combined with other circumstances of the case, violated the teachings of Hitchcock v. Dugger, 481 U.S. 393 (1987). As the state conceded at argument, the trial court's jury instruction in this instance facially

violated Hitchcock by failing to inform the jury that it could consider any and all mitigating evidence submitted by the defense. The question remaining is whether this error is harmless beyond a reasonable doubt.

We have reviewed the record in its entirety and are convinced that there is no reasonable possibility that the error contributed to Smith's sentence. See State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). Thus, the state has met its burden of proving harmless error. The facts of this murder, which are discussed at length in the prior cases involving this appellant, disclose a heinous and calculated abduction, sequestration and rape of the victim. After the rape, the victim then was transported to an isolated location and slain execution-style. An overwhelming

body of aggravating factors was found by the trial court and sustained by this Court on direct appeal. We can entertain no reasonable doubt that the result of the sentencing hearing would not have been different had the jury heard the proper instruction and considered any available mitigating evidence.

The order of the court below is affirmed. We find all other issues raised by Smith to be procedurally barred. The consolidated application for stay of execution and motion for stay of execution pending filing and disposition of a writ of certiorari in the United States Supreme Court is denied.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., Concur
BARKETT, J., Dissents with an opinion

NO MOTION FOR REHEARING WILL BE ENTERTAINED BY THIS COURT.

BARKETT, J., dissenting.

I cannot conclude beyond a reasonable doubt that the Hitchcock v. Dugger, 481 U.S. 393 (1987), error was harmless. Defense counsel at the trial had conceded in an affidavit that he did not properly develop the available nonstatutory mitigating evidence because he believed the law forbade its introduction as evidence--an erroneous assumption reinforced by the judge's erroneous jury instruction. At the very least, an evidentiary hearing is mandated to consider the testimony proffered by the attorney in his affidavit. Moreover, even without any additional evidence of mitigation, I cannot say that if the jury had been properly instructed, the result would

have been the same beyond any reasonable doubt. For example, the jury clearly had questions pertaining to whether Smith or codefendant Copeland fired the fatal shots. During deliberations, the jury asked the judge whether a defendant must be guilty of actually pulling the trigger or whether he may be found to have used a firearm through his association as an accomplice in a murder where a firearm is used. We have previously held that the fact that the defendant might not have been the shooter is a permissible nonstatutory mitigating factor. See, e.g., Taylor v. State, 294 So.2d 648, 652 (Fla. 1974). There were other factors presented that could have been deemed nonstatutory mitigation. Yet, the jury was not told they could consider these factors in deciding the penalty. Accordingly, I

would vacate the sentence and remand for a new sentencing hearing that complies with Hitchcock.

An appeal from the Circuit Court in and for Wakulla County,

Charles D. McClure, Chief Judge - Case No. 87-66

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